

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

TIMOTHY BROMAGHIN,)	
)	
Plaintiff,)	
)	
v.)	Case No. CIV-10-417-RAW
)	
JOSE E. VALDEZ, et al.,)	
)	
Defendants.)	

ORDER

Before the court is the motion of defendant Lincoln General Insurance Company (“Lincoln”) to dismiss. This is an action arising out of a vehicular accident which took place on November 11, 2008 near Colbert, Oklahoma. Among other defendants, plaintiff has named Lincoln as the liability insurer for defendant Rene Thompson d/b/a Path Finder Transport, L.L.C. The amended petition (the case commenced in state court) further alleges that Lincoln is a foreign insurance company incorporated in the state of Pennsylvania and authorized to do business in Oklahoma.

The pertinent part of Lincoln’s motion points out that a panel of the Oklahoma Court of Civil Appeals has ruled that the Oklahoma Motor Carrier Act does not permit a direct action against an interstate motor carrier’s liability insurer arising from a collision where the interstate motor carrier was properly registered in its home state under the “single state system” (i.e., where interstate motor carriers register and insure in their home states) and the plaintiff has not yet prevailed in the underlying negligence action against the insured motor carrier. *See Fierro v. Lincoln Gen. Ins. Co.*, 217 P.3d 158 (Okla.Ct.App.2009). The *Fierro*


opinion bears the notation “Released for Publication by Order of the Court of Civil Appeals of Oklahoma.” Thus, it is considered to have persuasive effect, but is not accorded precedential value. *See* Oklahoma Supreme Court Rule 1.200(c)(2). In his response, plaintiff does not attempt to distinguish the *Fierro* decision.

The motion, however, will not be granted at this time. Lincoln has presented its argument under the procedural vehicle of a motion to dismiss. Motions to dismiss do not usually contemplate exhibits and none are attached. Therefore, nothing before the court indicates that Path Finder Transport has in fact completed the proper registration and insurance in its home state. *See Chestnut v. Pervez*, 2008 WL 4191450 (N.D.Okla.2008). Defendant may file a motion for summary judgment with proper evidentiary support. Defendant need not repeat the argument already made in the present motion, but may incorporate the same by reference. For plaintiff’s part, if he files a concise response to the summary judgment motion, he should not ignore the *Fierro* decision but rather explain why this court should not follow the decision.

It is the order of the court that the motion of the defendant Lincoln General Insurance Company to dismiss (#9) is hereby DENIED.

ORDERED THIS 2nd DAY OF MARCH, 2011.

Dated this 2nd day of March, 2011.


Ronald A. White
United States District Judge
Eastern District of Oklahoma